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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:

**PETITION TO AMEND RULES 6,
7 AND 41 OF THE ARIZONA
RULES OF CRIMINAL
PROCEDURE**

Supreme Court No. R-16-0041

**COMMENT OF
THE ARIZONA PROSECUTING
ATTORNEYS’ ADVISORY
COUNCIL**

I. BACKGROUND OF PETITION

In conjunction with the Supreme Court task force report “Justice for All, Report and Recommendations of the Task Force on Fair Justice for All: Court-Ordered Fines, Penalties, Fees, and Pretrial Release Policies” (“Report”), the Administrative Director of the Administrative Office of the Courts has proposed amendments to Rules 6, 7 and 41, *Arizona Rules of Criminal Procedure*. The amendments would revise existing language in the rules, add new provisions and definitions related to appointment of counsel, bail, bonds, and conditions of release, and modify existing forms related to bond and release.

1 The Arizona Prosecuting Attorneys' Advisory Council ("APAAC") has
2 considered the proposed changes and makes two initial observations. First, it notes
3 the task force report must be filed with the Arizona Judicial Council ("AJC") by
4 October 31, 2016. Report, p. 2. To date, the recommendations themselves have not
5 been considered, approved or adopted by the AJC. Therefore, the rule petition
6 appears premature. Second, the Supreme Court granted petitioner's request for an
7 expedited consideration of its petition outside the annual rule processing cycle.
8 Arizona Supreme Court No. R-16-0041, Order, August 29, 2016. Since the
9 recommendations in the Report have not yet been adopted, it is unknown why this
10 petition is being considered on an expedited basis. Considering the scope of the
11 changes in the proposed amendments, APAAC believes additional time should be
12 granted for circulating the proposed amendments among interested stakeholders for
13 comment.
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15 With these initial comments, APAAC will address specific portions of the
16 petition's proposed rule changes with recommended modifications.
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18 **II. DISCUSSION/ANALYSIS**

19 A. Amendments to Rules 6.1(b) and 7.4

20 The petition recommends an amendment to Rule 6.1(b) to add a right to
21 counsel if an indigent defendant is "detained pretrial after criminal charges are
22 filed." An appointment of counsel is made *mandatory* for pretrial detainees under
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1 petitioner's proposed rule change to Rule 7.4, adding a new subsection (e).
2 APAAC notes that this proposal could have a tremendous financial impact on
3 cities, towns and counties throughout Arizona. For example, in fiscal year 2015
4 alone, municipal courts in Arizona saw total filings of 311,717 criminal traffic and
5 misdemeanor cases. Arizona Judicial Branch, 2015 Data Report, Municipal
6 Courts, Narrative Summary.¹ Justice courts saw total filings of 154,106 criminal
7 traffic and misdemeanor cases (excluding FTA). Justice of the Peace Courts,
8 Narrative Summary. Appointing counsel for every misdemeanor defendant who is
9 detained pretrial could seriously burden state and local jurisdictions with unfunded
10 costs.
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14 After considering the proposal and the policy implications behind it, APAAC
15 opposes the amendments to Rules 6.1(b) and 7.4. First, there is no empirical data
16 showing that unrepresented indigent defendants "languish" in jail due to a lack of
17 appointed counsel advocating for release conditions to an extent justifying the rule
18 change. On its face, the proposal appears to be a solution searching for a problem.
19 Second, if there is a problem, many jurisdictions are already addressing it in their
20 own ways. For example, Pima County appoints public defenders on felony matters
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25 ¹ <http://www.azcourts.gov/statistics/Annual-Data-Reports/2015-Data-Report>

1 at the Initial Appearance. Yavapai County adopted and utilizes a public safety
2 assessment tool (“PSA”) which is written and available to the court in most cases
3 at the Initial Appearance. Mesa Municipal Court, as part of a pilot project through
4 the John and Laura Arnold Foundation, implemented a pretrial risk assessment tool
5 for considering conditions of release. Creating mandatory appointment of counsel
6 for every defendant (particularly misdemeanants) detained pretrial, however, is
7 simply unworkable and unnecessary. Third, at such an early stage in the process it
8 is unclear what relevant information appointed counsel could possibly have bearing
9 on release conditions for every criminal defendant detained pretrial. Finally, the
10 sheer cost to counties, cities and towns of implementing this proposal makes it
11 unfeasible.

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15 B. Amendments to Rule 7.1 and 7.6(d)(2)

16 The petition recommends amendments to Rule 7.1 which remove the
17 specification that a bond is meant to assure the defendant’s “appearance” and add
18 new bond definitions for “cash bond” and “deposit bond.” The Arizona
19 Constitution provides three purposes of bail and conditions of release, the first of
20 which is the defendant’s appearance: 1) assuring the appearance of the accused; 2)
21 protecting against the intimidation of witnesses; and 3) protecting the safety of the
22 victim, any other person or the community. Ariz. Const. art. II, § 22.

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25 APAAC does not support the proposed change to Rule 7.1 and the

1 elimination of the reference to “appearance bond.” First, APAAC expresses
2 concern regarding the likely confusion the proposed removal of the references to
3 the defendant’s “appearance” will cause. Historically, the public understands that
4 a bond is to ensure a defendant’s appearance in court. The current clear expression
5 of this expectation is accepted by the courts of Arizona, which have observed that
6 the “primary purpose of an appearance bond is to ensure that the defendant appears
7 at court proceedings.” *State v. Int’l Fid. Ins. Co.*, 238 Ariz. 22 ¶ 8, 355 P.3d 624,
8 627 (App. 2015). Although it may be that courts are setting bonds too high or when
9 they are not necessary, if a judge does determine that a bond is among the
10 conditions to be imposed on a defendant’s release, then it is entirely appropriate to
11 make the primary purpose of the bond clear in the Rule, as it is clear now. APAAC
12 recommends not removing references to the essential nature of the bond, ensuring
13 the defendant’s “appearance,” from the Rules guiding courts in setting bonds.

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15 APAAC also requests clarification from petitioner as to what is meant to be
16 accomplished by a “deposit bond.” As stated by petitioner, the intent of a “deposit
17 bond” is to allow a defendant to post only a percentage of the full amount of a cash
18 bond set. However, there is no provision for collection of the balance of that bond
19 in the event of a forfeiture; in particular, the entity responsible for collection, the
20 effects of bankruptcy before or after a forfeiture, or the limitations on supplemental
21 proceedings while a defendant has a pending criminal case. In the event a
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1 defendant fails to appear, if the balance of the full amount of a cash bond set is
2 uncollectible, then having a bond category of “deposit bond” is a fiction. As it
3 exists, the language of the proposed definition of “deposit bond” is unclear.
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5 Finally, along this same line the addition of Rule 7.6(d)(2) also creates
6 confusion; it does not seem to allow for the circumstance when a court might have
7 reasons to partially forfeit and partially exonerate a bond. At a bond forfeiture
8 hearing, a court may order forfeiture of “all or part of the amount of the bond”.
9 Rule 7.6(c)(2). Rule 7.6(d) as currently written can accommodate any of the other
10 proposed changes and therefore it need not be amended.
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12 C. Amendments to Rule 7.2(a) 13

14 The petition recommends several amendments to Rule 7.2(a). APAAC has
15 comment on two. First, the proposed amendment adds a new opening sentence on
16 the presumption of innocence. While the statement is a correct principle of law, it
17 seems gratuitous and unconnected to the substance of the rule which is release for
18 offenses bailable as a matter of right.
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20 Second, the petition recommends that in imposing conditions of release the
21 court should consider the protection of “other persons or the community from an
22 actual risk posed by the person.” APAAC commends the petitioner for recognizing
23 risk to victims and the community when setting release conditions. However, use
24 of the word “actual” in defining risk in the proposed amendment is ambiguous, and
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1 APAAC recommends removal of that word. This would be consistent with A.R.S.
2 § 13-3967, which requires the court, when determining release, to take into account
3 “[e]vidence that the accused poses a danger to others in the community.” A.R.S. §
4 13-3967(B)(4). The statute requires no showing of an “actual” danger.
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6 The term “risk,” by definition, indicates there is not a certainty that harm will
7 be perpetrated, but that such harm is likely or possible. Whether a risk is highly
8 likely or merely possible can never be known with certainty. What is considered
9 serious risk by one person may only be considered a potential risk by another. For
10 the latter, in setting release conditions would the court be constrained from
11 considering risk if it felt there was only a potential risk to a person or the
12 community? What level of showing would be required before a court found
13 “actual” risk? Would the parties have to litigate whether a risk was actual as
14 opposed to merely potential? Using the term “actual” to define “risk” in the
15 proposed criminal rule is unhelpful to the court and has an ambiguous meaning
16 when defining risk. APAAC recommends eliminating that word.
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20 D. Amendments to Rule 7.3(b)

21 The petition creates an entirely new Rule 7.3(b), eliminating the old
22 subsection (b). APAAC generally concurs with the principles behind the
23 amendment of Rule 7.3(b), but would reiterate that the change in the priority for
24 considering imposing an appearance bond does not require any changes in the
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1 current appearance bond options. The new subsection 7.3(b) creates a new
2 category of discretionary conditions of release, and allows the court to impose both
3 non-monetary and monetary conditions. It also requires the court to consider the
4 results of an approved risk assessment, if any. APAAC again commends the
5 petitioner for requiring the consideration of a risk assessment tool, similar to what
6 is required in release decisions under A.R.S. § 13-3967(B)(5) (court shall take into
7 account the results of a risk or lethality assessment in a domestic violence charge).
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10 The proposed non-monetary conditions allow imposition of a number of
11 restrictions on a person, and APAAC recommends two additions. First, while
12 under the proposal a court can restrict the person from “consuming intoxicating
13 liquors or illegal drugs,” if Proposition 205 passes, the rule should make clear that
14 even though legal a court may still restrict a person’s use of recreational marijuana
15 as a condition of release. Second, APAAC recommends adding to the list an
16 *explicit* non-monetary condition that prohibits the person from having contact with
17 the victim of the crime.
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20 The petition contains another addition in Rule 7.3(b)(2) which provides that
21 when setting monetary conditions, the court must not impose a condition “that
22 results in unnecessary pretrial incarceration solely because the person is unable to
23 pay the bond.” This directive should not be a rule of criminal procedure. APAAC
24 understands that the Task Force Report is the genesis for this addition, but the
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1 language itself is ambiguous. Must a court first impose the monetary condition and
2 then determine if it has an unnecessary result? How is the court to determine a
3 person's inability to pay a bond at the time that monetary condition is set? What
4 makes pretrial incarceration "unnecessary"? It is not uncommon in a misdemeanor
5 trespass case that a bond of \$50 is set for a homeless or transient defendant because
6 that is the only means to assure their appearance in court. Does that result in
7 unnecessary pretrial incarceration because that defendant cannot pay the bond? If
8 there is no alternative means established by which to ensure the defendant's
9 appearance, is a bond permissible for someone who is indigent and penniless? This
10 is unclear. It appears this procedural rule is being amended to address substantive
11 law.
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15 E. NEW Rule 7.7

16 The petition recommends a new rule of criminal procedure 7.7 which would
17 allow a Superior Court to unilaterally modify conditions of release set on lower
18 court jurisdiction misdemeanor cases. The intent of the new rule is to allow a felon
19 - who is on Superior Court probation but has a misdemeanor hold - to participate
20 in treatment.
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22 While the intent of the proposed rule is laudable, there are negative
23 consequences that have not been anticipated in the proposed rule. First, if the
24 misdemeanor hold is on a victim case, there is no provision for providing notice to
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1 the victim or an opportunity to be heard before the Superior Court modifies the
2 release conditions. This could be a violation of existing law. Ariz. Const. art. II, §
3 2.1(4); Ariz. R. Crim. P. 7.4(b), 39(b)(6), (7); A.R.S. § 13-3967(G). Second, there
4 is no provision for communication between the Superior and lower jurisdiction
5 court (the proposal requires the Superior Court clerk only to provide a copy of its
6 order) or the affected prosecuting agencies. In most instances it is not the same
7 prosecuting office handling the felony and misdemeanor cases, and the prosecutor
8 would not know of modification of release conditions. Finally, there is no
9 provision for how the lower court jurisdiction would reacquire the defendant so
10 that disposition can occur on the misdemeanor case. Defendants must either be
11 able to sign for their court date or be given notice of their date. New rule 7.7 is
12 unworkable as proposed.

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16 F. Rule 41, Form 7

17 Finally, the proposed modifications to Rule 41, Form 7, could be better
18 drafted to implement the Petition's intended changes. The Petition presents the
19 twin needs of ensuring future court appearance and the public's safety. However,
20 proposed Form 7 only makes reference to the defendant's obligation to appear for
21 court, and not to any of the other conditions of release. Particularly if the new
22 categories and definitions of release and bonds are adopted, then Form 7 ought to
23 be clear regarding the greater obligation that the defendant or surety is undertaking
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1 and that the bond is subject to forfeiture for a violation of those obligations beyond
2 appearance. On this point, the Petition fails to recognize the substantial increase in
3 risk this new requirement would place on those persons who post bond, particularly
4 the bail bond industry. It is unknown what effect this increased risk would have on
5 the bonding industry's willingness to post bonds.
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7 Modified Form 7 as written also omits specification of any performance
8 requirement at all – even appearance – upon a Secured Bond without a surety and
9 a Secured Bond with a surety. The proposed language for a “Deposit Bond”
10 contemplates a portion of the bond being cash and a portion being unsecured, but
11 ambiguously provides that a defendant “will forfeit the cash bond.” Presumably
12 the unsecured portion of the bond is subject to forfeiture, but the “cash” reference
13 makes that unclear. Finally, the Petition states that Form 7 lists the bond types in
14 order of least restrictive to most restrictive but provides no explanation for that
15 order. Often a secured bond through a surety is easier for a defendant to post than
16 a cash bond. Bonds secured by a deposit of property are rare and often create delay
17 in release while the value of the property is determined. Should the proposed
18 changes to Rule 7.1 be adopted, APAAC urges that the proposed Form 7 be subject
19 to further review.
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RESPECTFULLY SUBMITTED this 19 day of October, 2016.

Electronic copy filed with the
Clerk of the Arizona Supreme Court
this 19 day of October, 2016.

by: Diana Cooney